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IN THE

Supreme Court of the United States

October Term, 1971
No. ..... 71 - 638

WASHINGTON TRUST BANK, as Trustee of the Endowment Care Fund of Greenwood Memorial Terrace Company,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

EVERGREEN CEMETERY ASSOCIATION OF SEATTLE, a corporation,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

JOINT PETITION FOR WRITS OF CERTIORARI
To the United States Court of Appeals for the Ninth Circuit

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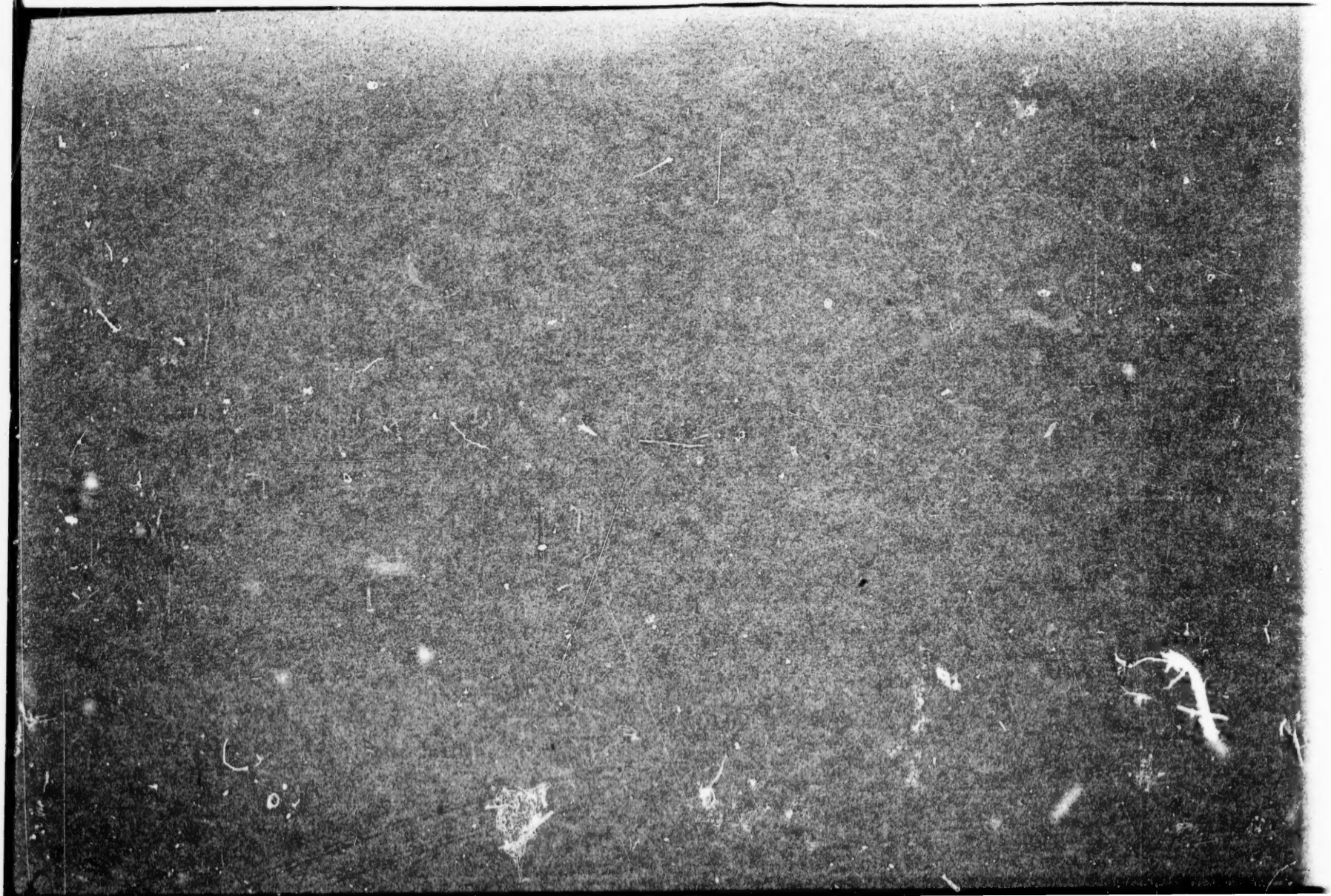

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JOINT PETITION FOR WRITS OF CERTIORARI
To the United States Court of Appeals for the Ninth Circuit

PETITION FOR CERTIORARI TO THE COURT OF APPEALS OF THE NINTH CIRCUIT

Petitioners, Washington Trust Bank, as Trustee of the Endowment Trust of Greenwood Cemetery and Evergreen Cemetery Association of Seattle, a corporation, jointly pray that writs of certiorari issue to review the judgments of the United States Court of Appeals for the Ninth Circuit entered July 7, 1971, denying petitioners' tax exempt status, and that on hearing the judgments be reversed.

OPINION BELOW

The opinion of the Court of Appeals in the *Washington Trust* case is reported at 444 F.2d 1235 (9th Cir. 1971). (App. 1) The opinion of the Court of Appeals in the *Evergreen* case is reported at 444 F.2d 1232 (9th Cir. 1971). (App. 2) The opinion of the District Court in the *Washington Trust* case is reported at 301 F. Supp. 713 (E.D. Wash. 1969) (App. 3), and the District Court opinion in the *Evergreen* case is reported at 302 F. Supp. 720 (W.D. Wash. 1969). (App. 4)

JURISDICTION

The *Washington Trust* case and the *Evergreen* case were consolidated for argument in the Court of Appeals. They were argued together on May 13, 1971. On July 7, 1971, the Court of Appeals filed opinions in both cases holding against the taxpayers. The District Court opinion in *Washington Trust* was reversed and the District Court opinion in *Evergreen* was affirmed.

Both taxpayers petitioned for a rehearing and on August 13, 1971, both petitions were denied. No order extending time to petition for certiorari has been entered.

The jurisdiction of the Supreme Court to review these decisions by certiorari is conferred by 28 U.S.C.A. Sec. 1254.

QUESTIONS PRESENTED

Is a cemetery endowment care fund (whether administered as a trust or as a non-profit corporation) entitled to tax exemption under IRC 501(c)(13) when its income must be used exclusively for cemetery maintenance and its principal must be held inviolable but when the cem-

etery for which it was established is operated by a profit sales company?

As to petitioner Washington Trust Bank the question is whether the endowment care fund is exempt as:

1. a cemetery company "owned and operated exclusively for the benefit of its members"; or
2. a cemetery company "which is not operated for profit."

As to petitioner Evergreen Cemetery Association the same questions are presented plus the additional question is raised as to this fund, which is administered as a corporation, of whether it is exempt as

3. a "corporation chartered solely for burial purposes as a cemetery corporation and not permitted by its charter to engage in any business nor necessarily incident to that purpose, no part of the net earnings of which inures to the benefit of any private shareholder or individual."

It appears to be conceded that if the cemeteries which the income from the funds maintain were operated by non-profit, tax exempt, sales companies, the funds would be entitled to a tax exempt status. The real question is, whether a perpetual care endowment fund, so restricted as such funds are in Washington State, loses it right to a tax exempt status merely because the cemetery for which it provides maintenance is otherwise operated by a profit sales company.

STATUTES INVOLVED

Internal Revenue Code of 1954, Sec. 501(c)(13):

> (a) *Exemption From Taxation.* — An organization described in sub-section (c) or (d) or section 401(a) shall be exempt from taxation under this subtitle un-

less such exemption is denied under section 502, 503, or 504.

* * *

(c) *List of Exempt Organizations.*—The following organizations are referred to in subsection (a):

* * *

(13) Cemetery companies owned and operated exclusively for the benefit of their members or which are not operated for profit; and any corporation chartered solely for burial purposes as a cemetery corporation and not permitted by its charter to engage in any business not necessarily incident to that purpose, no part of the net earnings of which inures to the benefit of any private shareholder or individual.

Washington State Cemetery Act, Wash. Rev. Code 68.44, especially,

68.44.070:

Purpose of Endowment Care—Validity. The endowment care and special care funds and all payments or contributions thereto are hereby expressly permitted for charitable and eleemosynary purposes. Endowment care and such contributions are provisions for the discharge of a duty from the persons contributing to the persons interred and to be interred in the cemetery and provisions for the benefit and protection of the public by preserving and keeping cemeteries from becoming unkept and places of reproach and desolation in the communities in which they are situated. No payment, or contribution for general endowment care, is invalid by reason of any indefiniteness or uncertainty of the persons designated as beneficiaries in the instruments creating the trust, nor is the fund or any contribution to it invalid as violating any law against perpetuities, or the suspension of the power of alienation of title to property.

68.44.020:

Use and Care of Funds. Endowment care funds shall not be used for any purposes other than to provide, through income only, for the endowment care stipu-

lated in the instrument by which the fund was established, and shall be kept separate and distinct from all other funds. The principal shall forever remain irreducible and inviolable.

68.44.170:

Use of Income From Fund. The income from the endowment care fund shall be used solely for the general care, maintenance, and embellishment of the cemetery, and shall be applied in such manner as the cemetery authority may from time to time determine to be for the best interest of the cemetery.

STATEMENT OF THE CASE

Both the petitioners are endowment care funds for cemeteries in Washington State and their sole purpose is to provide for the perpetual care and upkeep of the cemetery for which they were established.

Washington State Law regulating endowment cemeteries requires that not less than 10% of the sales price for cemetery lots be set aside in a separate endowment fund. Wash. Rev. Code 68.40.010. The income from this fund can be used "soley for the general care and maintenance and embellishment of the cemetery," Wash. Rev. Code 68.44.170, while the principal of the fund "shall forever remain irreducible and inviolable." Wash. Rev. Code 68.44.020.

The endowment care fund of the Greenwood Cemetery in the *Washington Trust* case is administered as a trust of which the petitioning bank is the trustee. The endowment care fund in the *Evergreen* case is administered as a non-profit corporation which has no stockholders but instead has "members." The lot owners, who have purchased lots and have thereby contributed to the fund, are

members of the corporation. The corporation itself is the petitioner in this case.

During the tax years in issue the sales activities at both the Greenwood Cemetery in Spokane and the Evergreen Cemetery in Seattle were conducted by conventional profit corporations which sold lots and performed burial services. During the tax years in question in each case the sales companies were engaged by the endowment care funds to perform the actual maintenance services and provide the upkeep of the cemeteries, including upkeep of the sold plots. In each case the net income from the endowment care fund was paid to the sales company for this service. During the tax years in question the actual direct cost to the sales companies of maintaining each of the cemeteries was in excess of the net income received from the endowment care funds. There is no contention that income from the endowment care funds has found its way into the surplus of the sales company or has even contributed to the general administrative expenses of the sales company, which distinguishes these cases from *Rosehill Cemetery Co. v. United States*, 385 F. Supp. 21 (N.D. Ill. 1968).

The administration of these endowment care funds through the corporation trustee in the *Washington Trust* case or the membership corporation in the *Evergreen* case is completely independent from the sales company. There is no contention that the investment or administrative decisions of the endowment care funds are affected by or controlled by the sales company.

The endowment care funds are free, if they wish, to employ a person or entity other than the sales company to perform the maintenance services which the endow-

ment care funds are required to provide by virtue of the state law and their governing instruments. For example, the applicable trust instrument in the *Washington Trust* case (Exhibit "1" in the trial court) provides:

> The trustees shall hold and manage the trust fund, collect the income therefrom and use or apply the net income therefrom solely for the care, maintenance and beautification of Greenwood Cemetery at Spokane, Washington. The trustees shall have the right to so use and apply the net income or in their discretion to pay the same over to the Association (the sales company) to be used by it solely for the purpose of caring for, maintaining and beautifying said cemetery.

The Articles of Incorporation for the Evergreen Cemetery Association required it to "expend or see to the expenditure of the income therefrom for the care and maintenance of said lots, crypts and niches."

Petitioners submit that there seem to be only two factual distinctions of possible legal significance between the two cases:

1. The Evergreen Fund is organized and administered as a corporation, whereas the Greenwood Fund in the *Washington Trust* case is administered as a trust;

2. The District Court in the *Washington Trust* case found as a fact that the sales company in that case was not under a legal obligation to maintain the Greenwood Cemetery. (App. 3) This finding was based on the examination of the sales contracts utilized by the sales company (Exhibits "101" and "102" in the trial court). The District Court Judge emphasized this finding in distinguishing the *Washington Trust* case from the *Evergreen* case in his decision. (App. 3) Petitioners contend that this is not an actual factual distinction, however, because in both cases the legal obligation to maintain the sold lots is an obligation of the endowment care fund and not of the sales company.

Since all the ordinary income of both petitioners is spent annually for maintenance expenses, the question as to tax exemption raised in these cases does not affect the taxation of ordinary income. The tax exempt status of petitioners in these cases to date has an impact only on the payment of capital gains taxes.

Petitioner Washington Trust Bank in asserting the tax exempt status of the Greenwood Endowment Care Fund is seeking a refund of capital gains taxes for the year 1963 in the amount of $21,819.95, and for the year 1964 in the amount of $5,162.65. Petitioner Evergreen Corporation in asserting a tax exempt status is seeking a refund of capital gains taxes paid for the year 1963 in the amount of $45,242,97, and for the year 1964 in the amount of $4,972.00.

Both petitioners filed timely claims for refunds and these actions were commenced when the claims were denied.

ARGUMENT

These cases pose the common question of whether an endowment care fund limited solely to the perpetual care of a cemetery is entitled to a tax exempt status under IRC 501(c)(13) when the other cemetery activities are performed by a sales company that is a conventional profit corporation. The government takes the position that if the sales company were tax exempt, the endowment care fund would be also. Rev. Rul. 58-190 (1958-1 C.B. 15); Rev. Rul. 64-214 (1964-2 C.B. 153). But since 1964, at least, the government has asserted that an endowment care fund loses its exempt status if the cemetery is operated by a profit corporation.

It should be noted that for the years in issue here only capital gains taxes are involved. Until recently the tax status of endowment care funds only raised the question of whether their capital gains may be accumulated without taxation. All of their ordinary income is spent currently for cemetery maintenance, and the endowment care funds have consequently claimed a distribution deduction and/or expense deduction, rendering the ordinary income of the endowment care fund deductible to it, but taxable in the hands of the company which receives the income as payment for cemetery maintenance services. Recently, however, the government has asserted its intent to deny the endowment care funds a distribution or expense deduction which would make the ordinary income of the care funds fully taxable to the endowment care funds and again taxable to the company which receives it for rendering maintenance services. Thus while only capital gains taxes are involved in the years in issue here, the question of entitlement to tax exempt status has much greater ramifications for the endowment care funds.

Taxpayers take the position that the Congressional policy behind the exemption was to insulate funds devoted exclusively to cemetery maintenance from debilitating taxation and that this policy applies without regard to whether the other cemetery activities happen to be currently conducted by a profit sales company.

The writ is requested on the grounds:

1. That the Court of Appeals has decided an important question of federal law which should be, but has not been settled by this court. The question affects cemeteries throughout the country and multiple litigation is presently taking place and will continue unless it is settled by the Supreme Court.

2. That the rationale of the Court of Appeals of the Ninth Circuit in these cases is in conflict with the rationale of the Court of Appeals of the Eighth Circuit. *Mercantile Bank & Trust Co. v. United States,* 441 F.2d 364 (8th Cir. 1971).

3. That the result of the decision in these cases of the Court of Appeals of the Ninth Circuit is in conflict with the holdings of the Court of Appeals of the Fifth and Sixth Circuits on related cemetery tax questions. *Metairie Cemetery Association v. United States,* 282 F.2d 225 (5th Cir. 1960); *Monte Vista Burial Park, Inc. v. United States,* 340 F.2d 595 (6th Cir. 1965).

4. That the decisions of the court below are in error on the merits and out of harmony with the Congressional policy behind the 501(c)(13) exemption.

1. The Question is of National Significance and Should Be Decided by This Court

The question raised by these appeals has only recently become the subject of litigation. It has never before been brought to the attention of this court. It has been considered by three Court of Appeals decisions: the two instant cases and *Mercantile Bank & Trust Co. v. United States,* 441 F.2d 364 (8th Cir. 1971). It has been considered by four District Courts in addition to those that resulted in the three appeals:

Denver United States National Bank v. U.S., 302 F. Supp. 801 (D.C. Colo. 1965);

Rosehill Cemetery Co. v. United States, 285 F. Supp. 21 (N.D. Ill. 1968);

First National Bank of Waco, 27 Am. Fed. Tax R.2d 952 (W.D. Tex. 1970).

The Arlington Memorial Park Association v. United States, 71-1 U.S. Tax Cas. 9393 (W.D. Ark. 1971).

It will be noted that all of these cases arose since 1965. Many more cases are pending in all parts of the country

and will be carried through exhaustive and expensive litigation unless this question is settled by this court.

The question of the tax exempt status of endowment care funds affects all cemeteries which are operated by profit sales companies and which maintain endowment funds for perpetual care. Since most cemeteries presently maintain such funds in response to public concern (usually reflected in state law requirements), the decision of this issue will have an impact on the endowment funds of virtually every major cemetery in the nation.

The long-range nationwide economic impact of the decisions of the Court of Appeals on the issue presented by this petition should be considered. At present the funds maintained by the petitioners and similar endowment care funds throughout the country do not produce sufficient income to fully provide adequate care and maintenance. If these funds are required to pay taxes on their capital gains resulting from a switching of low income producing investments to higher income producing investments, their ability to produce sufficient income will be further reduced. The consequences, absent remedial legislation in the event the Court of Appeals are correct, will be the progressive inability of the care funds to provide care and maintenance of cemeteries resulting in their falling into disrepair or the need for governmental maintenance. This economic peril to our nation's cemeteries is being further intensified by recent audit practices of the Internal Revenue Service which propose to disallow the endowment care funds a deduction for the income actually spent for care and maintenance. The disallowance of this deduction, which is a comparatively recent development, will further reduce the amount of money avail-

able nation-wide for cemetery care and maintenance. However, if petitioners are correct that Congress specifically intended by existing legislation (IRC 501(c)(13) and 61 Cong. Rec. 7487-7490) that funds set aside or used exclusively for cemetery care and maintenance are to be tax exempt, the dual threat to our nation's endowment care funds of taxation of capital gains and taxation of ordinary income will be averted. Even if this Court affirms the decisions of the Courts of Appeals a foundation will have been estabished for remedial legislation to avoid a forthcoming disaster to the nation's cemeteries and their surrounding environs.

2. The Rationale of the Court of Appeals in the Cases Below is in Conflict With the Rationale of the Court of Appeals for the Eighth Circuit on the Same Matter

Shortly prior to the argument in the cases below the Court of Appeals for the Eighth Circuit decided a similar case against the taxpayer. *Mercantile Bank & Trust Co. v. United States,* 441 F.2d 364 (8th Cir. 1971). The Eighth Circuit opinion starts from the dubious proposition that the exemption is a matter of legislative grace to be narrowly construed, ignoring the cautionary counsel of the present Solicitor General, Griswold, *An Argument Against the Doctrine That Deduction Should Be Narrowly Construed as a Matter of Legislative Grace,* 56 Harv. L. Rev. 1142, and the words of this court, *Helvering v. Bliss,* 293 U. S. 144 (1934), at 150-51. From its narrow construction premise the Eighth Circuit concluded that the taxpayer had not sustained the burden of establishing that it was a "cemetery company." The court held that in order to qualify for tax exemption as a "cemetery company" the

trust must perform more cemetery functions than cemetery maintenance.

This rationale not only overlooks that the primary Congressional purpose in establishing the exemption was to provide for cemetery maintenance, 61 Cong. Rec. 7487-7490, but also produces the result that a perpetual care fund could never qualify for tax exemption—even after the cemetery was full and the sales company had gone out of business—because it would never perform more cemetery functions than mere cemetery maintenance.

The Ninth Circuit in the cases below rejects the extreme rationale of the Eighth Circuit and carefully leaves open the possibility of a fund qualifying for exemption when the sales company has ceased to exist. But it holds that at the present time the endowment care funds are not even performing the cemetery service of maintenance. It would appear to be necessary for the trust officers of the Washington Trust Bank or the members of the Evergreen Association to push the lawnmowers around the cemetery themselves in order to obtain tax exemption. Surely this artificial conclusion no more reflects the Congressional policy than the conflicting, but similarly strained conclusion of the Eighth Circuit that cemetery maintenance is not enough of a cemetery service to qualify the care funds as a cemetery company.

In light of this conflicting rationale, endowment care funds are left in a quandry as to what steps, if any, might be taken now to obtain a tax exempt status either at the present time or after the sales company has ceased to exist.

3. The Result of the Opinions Below is in Conflict With Opinions of the Fifth and Sixth Circuits on Related Cemetery Tax Questions

The effect of the decisions below is to make the tax status of the endowment fund turn on the tax status of the sales company that is presently operating the cemetery. This result is inconsistent with earlier developments in cemetery tax law.

One of the first tax questions that developed with endowment funds was whether a sales company had to pay income tax on contributions which it turned over to the fund. After much litigation, the government lost that encounter on the ground the sales company was not the beneficiary of the fund and therefore not taxable on monies turned over to it. This position is reflected in Revenue Ruling 58-190 in "Situation 1" (1958-1 C.B. 15).

Subsequently the question developed whether income distributions from an endowment trust back to the sales company for maintenance have the same income tax character in the hands of the sales company as they did in the hands of the trust. Specifically, the question arose in the context of whether the interest from municipal bonds continued to be tax exempt when it was received by the sales company, and whether the sales company would be entitled to a dividend-received-deduction on account of income from dividends being distributed by the endowment trust.

The government won this encounter by applying the reasoning of the earlier cases, namely that the sales companies were not the beneficiaries of the endowment trusts and therefore were not entitled to the tax advantage that

would accrue if income in their hands had the same character as the income of the trust.

Metairie Cemetery Association v. United States, 282 F.2d 225 (5th Cir. 1960);

Monte Vista Burial Park, Inc. v. United States, 340 F.2d 595 (6th Cir. 1965).

These decisions of the Fifth and Sixth Circuits are grounded on the premises that the endowment funds and the sales companies are separate and distinct and that the beneficiaries of the endowment funds are the lot owners and not the sales companies. From this premise the tax status of endowment funds should not be defined by the tax status of sales companies. Yet that is precisely the result of the opinions below. This indicates, we submit, a basic flaw in the rationale of the opinions below which is discussed in the next and final section of this petition.

4. The Decisions Below Are Out of Harmony With Legislative Policy

The Cemetery Act of the State of Washington, Wash. Rev. Code 68.44, is typical of the law of most other states to the extent it requires or regulates perpetual care or endowment trusts. State statutes pertaining to cemetery endowment funds reflect, we submit, the same public policy and the same legislative concern that prompted Congress to enact the predecessor of IRC 501(c)(13) in 1921. The Congressional debate at the time the exemption statute was enacted focused on the need to assure permanent care for cemeteries. Tax exemption was viewed as desirable and appropriate for funds devoted to cemetery maintenance, but as inappropriate for the profitable de-

velopmental activities. 61 Cong. Rec. 7487-7490.[1] The relationship of the legislative history to the present interpretation of 501(c)(13) has been ignored by the Court of Appeals decisions.

The Washington State Cemetery Act recites a similar concern for cemetery maintenance, Wash. Rev. Code 68.44.070:

> The endowment care . . . funds . . . are hereby expressly permitted for charitable and eleemosynary purposes. Endowment care and such contributions are provisions for the discharge of a duty from the persons contributing to the persons interred and to be interred in the cemetery and provisions for the benefit and protection of the public by preserving and keeping cemeteries from becoming unkempt and places of reproach and desolation in the communities in which they are situated . . .

The decisions of the Ninth Circuit in these cases as well as that of the Eighth Circuit in *Mercantile Trust, supra,* appear to have lost sight of the fact that the purpose of this tax exemption was to provide for cemetery maintenance to prevent cemeteries from becoming abandoned and unkempt, and to insulate funds devoted to this purpose from shrinkage through tax payments on appreciated value.

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1. MR. SPENCER . . . Now, everybody knows that where a corporation buys land by the acre and sells it by the square foot there is a profit that is simply phenomenal; and if that profit goes to the stockholders, of course, the cemetery company ought to pay a tax. If that profit goes to the beautification of the cemetery, then I agree with the Senator from Tennessee.

MR. MCCUMBER: The object is to exempt them from any corporate taxes so long as they are exclusively engaged in the business referred to, and so long as all of their income is used to beautify the cemetery . . .

It permits the profit to be used for public purposes and for the most worthy purposes of which it could be used, the keeping up of the cemetery . . .

If all profits are utilized for beautifying the cemetery and keeping it up, they ought not to have to pay.

Both circuit courts have refused to base their opinions on the argument that earnings from the endowment care funds were somehow inuring—however indirectly—to the benefit of the sales companies. (Although this rationale was strenuously urged by the government.) Indeed the structure of the three exemptions in IRC 501(c)(13) is such that the inurement of earnings test is not even applicable to the first two exemptions. *Commissioner v. Kensico Cemetery*, 96 F.2d 594, 596 (2nd Cir. 1938). The Internal Revenue Service Recognized this reading in a Ruling (I.T. 1541, I-2 C.B. 182, withdrawn as to future transactions in 1967 by R.R. 67-46, 67-1 D.B. 377), stating that the inurement of earnings language

> does not limit the first clause covering cemetery companies owned and operated exclusively for the benefit of their members or which are not operated for profit.

But in a sense the result of these cases that makes the tax status of the endowment care fund turn on the tax status of the sales company, is to write back into the statute a requirement that Congress excluded.

The attempt to equate the endowment care fund to the sales company through "inurement of earnings" or an "adjunct theory" or by holding that furnishing income for maintenance is not a cemetery service, is to ignore that the cemetery itself is a separate entity, — separate from both the sales company and the endowment care fund. The sold cemetery lots (which are maintained by the endowment care fund) are not owned by the sales company or developers. This part of the cemetery (which will ultimately be the entire cemetery) is owned by lot owners who are the contributors to and the beneficiaries of the endownent care fund. Why should the tax status of

their endowment care fund turn on the type of sales company that is operating the unsold portion of the cemetery from time to time?

To tax the capital gains of these funds has an impact not only on their ability to provide maintenance now, but also on their long term ability to provide maintenance when the cemetery is full and there no longer is a sales company. The public policy of preventing cemeteries from becoming places of desolation is best served by not taxing endowment care funds. That public policy was behind 501(c)(13) and it should not be thwarted by narrowly construing the exemption at this time.

CONCLUSION

The writs should be granted so that this question of national significance may be resolved by this court. The cases below should be reversed, to affirm the judgment of the District Court in the *Washington Trust* case and reverse the judgment of the District Court in the *Evergreen* case upon the conclusion that capital gains which are permanently set aside by a cemetery endowment care fund should not be subject to taxation.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

WASHINGTON TRUST BANK, as Trustee of the Endowment Care Fund of Greenwood Memorial Terrace Company, *Appellee,* v. UNITED STATES OF AMERICA, *Appellant.*	No. 25,219

Appeal from the United States District Court for the Eastern District of Washington.

Before: CHAMBERS and HAMLEY, Circuit Judges, and GOODWIN, District Judge.*

PER CURIAM:

The district court entered judgment granting a refund of capital-gain taxes paid by plaintiff, a trustee of an endowment fund established under Washington law to provide perpetual care for a profit-making cemetery.

The judgment is reversed, for the reasons stated in *Evergreen Cemetery Association of Seattle v. United States of America,* ..... F.2d ..... (9th Cir. 1971).

The difference between a trustee (this case) and a nonprofit corporation (Evergreen Cemetery case) has no bearing upon tax exemption under Internal Revenue Code of 1954, §501(c)(13).

*The Honorable Alfred T. Goodwin, District Judge for the District of Oregon, sitting by designation.

APPENDIX B

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

EVERGREEN CEMETERY ASSOCIATION OF SEATTLE, a corporation, *Appellant,* v. UNITED STATES OF AMERICA, *Appellee.*	No. 24,805

Appeal from the United States District Court for the Western District of Washington at Seattle.

Before: CHAMBERS and HAMLEY, Circuit Judges, and GOODWIN, District Judge.*

GOODWIN, District Judge:

A cemetery "perpetual care" corporation appeals from a district court judgment denying a refund of capital-gain taxes paid in 1963 and 1964. We affirm.

Two corporate entities are material:

(1) The Evergreen Cemetery Company operates for profit three cemeteries in the Seattle area. It sells cemetery lots, burial crypts, and monuments. It also derives income from opening and closing graves and from the sale of flowers. This company will be referred to as "Sales."

(2) Evergreen Cemetery Association of Seattle, plaintiff, is the successor to the assets of the "Perpetual Care Fund of the Evergreen Cemetery Co. of Seattle." The fund was established by Evergreen Cemetery Company in 1940. A trust agreement vested the fund in individual trustees. Since 1946, the fund has been managed by plaintiff, a nonprofit,

*The Honorable Alfred T. Goodwin, District Judge for the District of Oregon, sitting by designation.

nonstock corporation, organized to comply with local statutes governing perpetual-care funds for cemeteries. This company will be referred to as "Care."

Sales deposits with Care a portion of the sale price of each grave, niche, or crypt sold. Care, in turn, remits annually to Sales all its net income from investments. Sales uses the income to maintain the cemetery. Maintenance costs to date have exceeded the income from Care's investments. Sales pays the excess of such costs over investment income as a current expense of operating the cemetery. When all lots in a cemetery have been sold and occupied, the corpus of the trust in Care's possession presumably will have grown so that the investment income will be sufficient to defray all maintenance costs.

The fund is managed by a board of trustees, but Care, as a corporation, has regular meetings at which each living owner of a cemetery lot, niche, or crypt is entitled to vote. Sales has no control over the investment of the fund. Care has no control over the sale or management of the cemetery property.

Care argues that it is not subject to taxation, because it comes within the exemption granted by Internal Revenue Code of 1954, §501(c)(13):

> "Cemetery companies owned and operated exclusively for the benefit of their members or which are not operated for profit; and any corporation chartered solely for burial purposes as a cemetery corporation and not permited by its charter to engage in any business not necessarily incident to that purpose, no part of the net earnings of which inures to the benefit of any private shareholder or individual."

Care contends that it qualifies under the clause: "or which are not operated for profit."

The government argues alternatively:

(1) Care is in essence an operating arm of the profit-making company, and thus cannot be deemed a nonprofit organization under Section 501(c)(13).

(2) If Care is a separate entity from Sales, and does not partake of Sale's profit-making character, then Care must be denied exemption under Section 501(c)(13), because it is not, standing alone, a "cemetery company."

The government's single-entity argument is not convincing. The separate nature of Care's corporate existence was carefully established and maintained.

In view of the legislative history of Section 501 and Congressional desire to exempt from taxation income used to maintain cemeteries, Care should be entitled to the exemption if it is a "cemetery company." See *Metairie Cemtery Association v. United States*, 282 F.2d 225 (5th Cir. 1960); *Monte Vista Burial Park, Inc. v. United States*, 340 F.2d 595 (6th Cir. 1965).

Care is not, however, at this time a "cemetery company." Care handles investments. The proceeds of Care's investments pay for the care and maintenance of cemetery property operated by others. Care performs no cemetery services except the remitting of money to the company that performs all services.

In construing the statutory phrase "cemetery company," the ordinary meaning of the words controls, and Care cannot at this time be said to come within any general definition of "cemetery company." *Mercantile Bank and Trust Company v. United States*, ... F.2d ..... (8th Cir., April 12, 1971). To call an investment company a "cemetery

company" would be similar to calling a mortgage banker a home-builder. For the purposes of exemption from taxation, the character of an organization is determined more by what it does than by what it calls itself.

Revenue Ruling 58-190 does not compel the conclusion that a corporation servicing a perpetual-care fund is a cemetery company. That ruling merely states that where an endowment care fund and an operating company seek to be treated as a single entity for tax purposes, tax-exempt status is proper as long as the fund company and the operating company are both nonprofit organizations. Revenue Ruling 64-217 reaches a contrary result where the operating company is a profit-making organization.

In this case, Care has succeeded in dissociating itself from the profit-making purposes of Sales; but it has also given up the right to claim the operational character of Sales as a "cemetery company."

Standing alone, Care is not entitled to tax-exempt status, because it is not a cemetery company. *Rosehill Cemetery Company v. United States,* 285 F. Supp. 21 (N.D. Ill. 1968); *Mercantile Bank and Trust Co. v. United States,* supra. We express no opinion with respect to the status of a perpetual-care, nonprofit corporation that has actually taken over the profitless management of a "sold-out" cemetery property. Such is not the case here for review.

The judgment of the district court is affirmed.

EVERGREEN CEMETERY ASSOCIATION OF SEATTLE, a corporation,
Appellant,
v.
UNITED STATES OF AMERICA,
Appellee.

No. 24,805

CHAMBERS, Circuit Judge, concurring:

I concur in the result. If the Care company were actually paying currently the total cost of maintenance of sold lots, I would extend Revenue Ruling 58-190 to give Care income tax exemption.

He who buys "perpetual care" necessarily thinks the price he pays covers total care beginning now. When it does not and the sales company makes up the difference between cost of maintenance of sold lots and the income of the perpetual fund, charity becomes too intertwined with promotion. And, so I am not shocked by Care failing to get income tax exemption, which for practical purposes applies only to capital gains.

Of course, I do not mean to suggest that separate lawn mowers should be bought for sold and unsold lots. There could be a proper allocation of total costs.

s / RICHARD H. CHAMBERS
United States Circuit Judge

APPENDIX C

WASHINGTON TRUST BANK, as Trustee of the Endowment Care Fund of Greenwood Memorial Terrace Company,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

United States District Court, Eastern District Washington, Northern Division, Civil No. 3200, July 11, 1969 (301 F. Supp. 713)

[*Code Sec. 501(c)(13)*]

Exempt organizations: Trust: Perpetual care fund.—A perpetual trust fund created for the care and maintenance of a cemetery owned and operated by the corporation that created the trust was exempt from tax as a cemetery corporation not operated for profit. The trust income and corpus were committed to providing perpetual care of the cemetery, under an obligation to the lot owners, and it was immaterial that the work was done by the profit-making corporation, which was paid with trust income. Back references ¶3053.0581 and 3053.07.

Reiley & Annis, 855 Lincoln Bldg., Spokane, Wash., for plaintiff. Dean C. Smith, United States Attorney, Spokane, Wash., for defendant.

Opinion

Nature of Proceedings

EAST, District Judge: The Washington Trust Bank as Trustee above (Trust Bank), seeks to recover on behalf

of the Endowment Care Fund of Greenwood Memorial Terrace Company (Greenwood Trust) a refund of federal income taxes paid to the United States of America (Government) for the calendar years of 1963 and 1964 in the amounts of $21,819.95 and $5,162.65, respectively, together with interest thereon as allowed by law.

This Court has jurisdiction under the provisions of Title 28, United States Code, Section 1346.

Issues of Law

1. Whether Greenwood Trust is exempt from federal income taxation under Section 501(a) of the Code as a "cemetery compan(y) . . . which . . . (is) . . . not operated for profit; . . ." described in Section 501(c)(13).

2. Whether Trust Bank can raise in its P. T. O. Contentions and advance at trial, as alternative grounds for recovery, subsections of the Internal Revenue Code which were not specifically set forth in their claims for refunds, namely:

(a) Whether Greenwood Trust qualified for federal tax exemption as a charitable trust described in Section 501(c)(3) of the Internal Revenue Code of 1954.

(b) Whether Greenwood Trust is entitled to a Section 642(c) deduction for capital gains realized in 1963 and 1964 as amounts permanently set aside for charitable uses.

Findings of Fact

I find from the admitted facts contained in the pretrial order and all of the evidence in the case that:

1. At all times materials herein, Greenwood Memorial Terrace Company or its predecessors (Greenwood Corpo-

ration) was a Washington profit-making corporation, with its principal place of business in Spokane, Washington, engaged in the operation of a cemetery and related services near Spokane, Washington, since the early 1890's;

2. As a part of its operation Greenwood Corporation sells burial lots and mausoleum compartments, however, does not promise or agree to provide perpetual care for the same;[1]

3. Greenwood Trust was created by a trust agreement dated December 16, 1938, by and between Greenwood Cemetery Association (a predecessor of the Greenwood

1. Greenwood Corporation carries on two generalized types of sales programs, namely "pre-need space" and "at need space." The "pre-need" program involves undeveloped land, and the sales program emphasizes the future planning feature. A great majority of these sales are made under a typical time-payment plan and provide liberal exchange provisions for "at need space." The contractual provisions with reference to future permanent care are contained in the following paragraph:

"It is agreed and understood that GREENWOOD MEMORIAL TERRACE COMPANY is operated as an endowment care cemetery, which means that an 'Endowment Care Fund' has been established in conformity with prudent cemetery management. 'Endowment Care' means to keep the sod in repair in all places were interments have been made; to care for trees and shrubs planted by the cemetery; to maintain all roads, curbs, gutters, drains, water lines, entrance ways and to maintain a file of records pertinent to all lot owners and interments." (Government selected Tr. Ex. 101.)

The purchaser's contribution or payment to the Endowment Fund is a stated sum, as in Tr. Ex. 101:

"Minimum Developed Price $360–
Endowment Care ..... 36–."

The time-payment provision provides that:

". . . All payments shall be applied first on any interest then due, then on purchase price of the property, and then on the deposit to the Endowment Care Fund."

The "at need" sales program deals with improved and developed cemetery lots ready for occupancy, (Government-selected Tr. Ex. 102), and is a present sale. The sales agreement is silent as to future permanent care and maintenance except for the bold-type wording at the bottom as follows: "ENDOWMENT CARE PROPERTIES (Over One Million Dollars in Endowment Care Trust Fund)" and the acknowledgment of the payment of "Property $40.00" and "Deposit in Endowment Care Fund ($) 4.00."

Corporation) and John McKinley, T. J. Meenach and William A. Corey as Trustees, as a perpetual trust fund for the care and maintenance of the cemetery owned and operated by the Greenwood Corporation (Tr. Ex. 1);

4. The original trust agreement was amended for the first time on January 19, 1961, to designate The Old National Bank of Spokane as successor trustee (Tr. Ex. 2)[2] and again amended on December 14, 1961 (Tr. Ex. 3);

5. The Amendment of January, 1961, acknowledges that the maintenance and operation of Greenwood Trust had been and was regulated by the General Cemetery Act of the state of Washington, RCW 68.44 *et seq.*;

6. In 1961 the Greenwood Trust applied to Internal Revenue Service for an exemption from federal income taxation as a cemetery company under the provisions of Section 501(c)(13). The application was denied, and the trustees were formally notified of the denial of their application for an exemption by letter dated August 25, 1961 (Tr. Ex. 16);

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2. The succeeded trustees transferred all their right, title and interest in and ". . . to the assets now held in (the) Greenwood Cemetery Association Perpetual Care Fund Trust, . . . and the Association agreed ". . . to pay over sums to the Trustee from time to time as the same shall be received by the Association as payments for endowment care, which payments shall in no case be less than the amounts required to be deposited in the endowment care funds by endowment care cemeteries under the General Cemetery Act of the State of Washington as the same may be amended from time to time."

Paragraph (2) of the Amendment provides:

"All such sums paid to the Trustee hereunder shall be held and managed by the Trustee, and the Trustee shall collect the income therefrom, and so use or apply the net income therefrom solely for the care, maintenance and embellishment of Greenwood Cemetery and its Mausoleum. The Trustee *shall have the right so to use and apply the net income, or at his discretion to pay the same over to the Association to be used by it solely for the purpose of caring for, maintaining and embellishing the Cemetery and said Mausoleum.*" (Emphasis supplied.)

7. The Old National Bank of Spokane acted as trustee of the Greenwood Trust from January 19, 1961, until July 19, 1963, when the board of directors of the Greenwood Corporation unanimously adopted a resolution appointing Mason Letteau, Ronald C. Waranch, and A. J. Dietsch as successor trustees (Tr. Ex. 5) who served as trustees of the Trust Fund until January 4, 1966, when Ronald C. Waranch and A. J. Dietsch resigned and were replaced by Betty Letteau and J. R. MacFadden (Tr. Ex. 6) who, along with Mason Letteau, served as trustees from January 4, 1966, until March, 1968;

8. The present trustee (Trust Bank) was appointed by order of the Superior Court of Spokane County on or about March 22, 1968, and the Superior Court approved a new Trust Agreement on April 30, 1968 (Tr. Exs. 7 and 8).

9. The Greenwood Corporation was reorganized and its stock changed hands on July 20, 1962, and from then on through January, 1966, the following persons served as officers of the Greenwood Corporation and as members of its board of directors:

Directors: Paul W. Trousdale (Chairman), Mason Letteau, R. C. Waranch, A. J. Dietsch, W. J. Carlson, Herbert Meline (until 5/14/64).

Officers: Paul W. Trousdale, Chairman, Board of Directors; Mason Letteau, President; R. C. Waranch, Vice-President, Treasurer; A. J. Dietsch, Vice-President, Secretary; W. J. Carlson, Vice-President, Manager; Allan H. Toole, Assistant Treasurer; William Pendell, Assistant Treasurer; Herbert Meline, Vice-President (until 5/14/64);

10. That except for the bare dual capacity as a trustee of the Greenwood Trust and a director of the Greenwood

Corporation of Ronald C. Warranch, Mason Letteau and A. J. Dietsch, the management of Greenwood Corporation exercised no control or direction over the individual trustees in the management of the Greenwood Trust, particularly in determining the trust's investments;

11. The individual trustees retained the firm of Lionel D. Edie as an investment advisor, investment decisions were made by the trustees based on the advice of the Edie firm, the trustees invested in securities through the brokerage firm of E. F. Hutton & Company who held the portfolio in street name, and the fees of the Edie firm and the Hutton firm were paid by the trust;

12. On or about May 15, 1964, the trustees, Mason Letteau, Ronald C. Waranch, and A. J. Dietsch, filed the Trust Fund's U. S. Fiduciary Income Tax Return (Form 1041) for the calendar year 1963, with the District Director of Internal Revenue, Spokane, Washington, (Tr. Ex. 10) and paid tax shown due on the face of the return in the amount of $21,711.39, plus interest of $108.56 for late filing, for a total of $21,819.95;

13. On or about April 19, 1965, the trustees, Mason Letteau, Ronald C. Waranch, and A. J. Dietsch, filed the Trust Fund's U. S. Fiduciary Income Tax Return (Form 1041) for the calendar year 1964, with the District Director of Internal Revenue, Tacoma, Washington, (Tr. Ex. 11) and paid tax shown due on the face of the return in the amount of $5,162.65;

14. The trustees timely filed claims for refund (Forms 843) with the District Director of Internal Revenue, Tacoma, Washington, claiming a refund of all amounts paid by the Greenwood Trust for 1963 and 1964, wherein the

trustees asserted as a ground for refund that during the years in question the Trust was an organization exempt from federal income taxation under the provisions of Section 501(c)(13) of the Internal Revenue Code of 1954 (Tr. Exs. 12 and 13);

15. The Internal Revenue Service notified the trustees by certified letters dated July 24, 1967, that their claims for refund were denied in full, and the Trust Bank timely brought this action for refund of the amounts claimed therein.

16. During the period in question, the Greenwood Corporation made timely monthly payments to Greenwood Trust of all amounts representing 10 per cent of the sales price of the burial sites and mausoleum spaces sold and for which complete payment had been received by the company during that month, and on installments sales, the company did not pay any portion of the sales price over to the Greenwood Trust until all of the installments had been paid, at which time the requisite 10 per cent of the sales price would be included in that month's payment to the Trust;

17. All payments made to the Greenwood Trust were made in accordance with the Washington statute and the terms of the contract of sale (Tr. Ex. 101);

18. The Greenwood Trust maintained a bank account and financial records separate and distinct from those of the Greenwood Corporation;

19. During the period in question, the Greenwood Trust made periodic disbursements of its net income to the Greenwood Corporation, upon receipt the Greenwood Corporation deposited these amounts in a general bank ac-

count co-mingling general corporate funds, and all of the Greenwood Corporation's expenses (with the exception of wages) were paid out of this account;

20. During the years in question, and in all prior years, the amounts expended by the Greenwood Corporation for maintenance and care of the cemetery far exceeded the yearly income paid to the Greenwood Corporation by Greenwood Trust (Tr. Ex. 9), and Greenwood Corporation made no charges against the Greenwood Trust income so paid on account of its overhead or other management or capital outlay;

21. The amounts reported on the tax returns in issue in this action as "income" are attributable to capital gain realized on the sale of trust assets, and said amounts were allocated to and retained by the trustees as corpus under the terms of the Trust Agreement.

Conclusions of Law

From the foregoing Findings of Fact, I conclude as follows:

1. Capital gains are not expendable income of Greenwood Trust but are accretions to and become a part of the corpus of the trust.

2. The Greenwood Trust, under Washington State law and its direct trust agreement terms, is under an obligation to the lot owners to and did apply all its income, less allowable management expense, to the perpetual care and maintenance of Greenwood Corporation's cemetery,[3] and the application of the net income (ascertained as above) of

3. "The income from the endowment care fund shall be used solely for the general care, maintenance and embellishment of the cemetery . . ." R.C.W. 68.44.170.

the Greenwood Trust by the trustees to the Greenwood Corporation is in the nature of payment for services rendered by the Greenwood Corporation to the Trust and its beneficiaries in caring for and maintaining the lots and mausoleum space sold and the cemetery generally;

3. Under Washington State law, as dictated by RCW 68.44.020, and the direct provisions of the Trust Agreement, the fund corpus of the Greenwood Trust has been at all times and is now required to "forever remain irreducible and inviolable" for the perpetual care of the cemetery,[4] and that neither the fund corpus nor any part thereof can ever inure to the benefit of the Greenwood Corporation or its shareholders, except as incidental to the lot and space owners and general public benefit;

4. Greenwood Corporation is not a beneficiary of Greenwood Trust;

5. The true and real beneficiaries of the Greenwood Trust are the purchasers of the burial lots and mausoleum space and the general public.[5]

6. The Greenwood Trust is a "cemeter(y) . . . which (is) . . . not operated for profit; . . ." within the reading and meaning of the second of three separate and distinct grounds for exemption contained in Section 501(c)(13),

4. The taxation of capital gains invades and reduces the fund corpus of the Greenwood Trust and the *Revenue Ruling* 64-217 (infra) tends to vitiate the public policy of the State of Washington.

5. "The endowment care and special care funds and all payments or contributions thereto are hereby expressly permitted for charitable and eleemosynary purposes. Endowment care and such contributions are provisions for the discharge of a duty from the persons contributing to the persons interred and to be interred in the cemetery and *provisions for the benefit and protection of the public by preserving and keeping cemeteries from becoming unkept and places of reproach and desolation in the communities in which they are situated. . . .*" R.C.W. 68.44.070 (Emphasis added.)

and by reason thereof is exempt from federal income tax under Section 501(a) of the Internal Revenue Code of 1954;

7. The action of the Internal Revenue Service in denying Greenwood Trust's application for exempt status (Finding of Fact No. 6) was contrary to law, and is therefore arbitrary;

8. The Trust Bank is entitled to a refund of the taxes paid together with interest thereon as allowed by law as contended for in the pretrail order.

Discussion

Conclusions of Law Nos. 1, 2, 3, 7 and 8:

Suffice, in my opinion, the Conclusions of Law are self-evident.

Conclusions of Law Nos. 4, 5 and 6:

Commissioner v. Kenisco Cemetery, 96 F.2d 594 (2d Cir. 1939) tells us at page 596:

> "There are three statutory requisites for exemption and these are mutually independent. The presence of any one of them creates an exemption."

See also *Rose Hill Memorial Park, Inc. v. Comm.* [CCH Dec. 29,961(M)], 23 TCM 1434 (1964) and *Forest Lawn Memorial Park Association, Inc. v. Comm.* [CCH Dec. 12,221], 45 BTA 1091 (1941). I am of the opinion that those requisites for exemption contained in Sec. 501(c)(13) are to be liberally construed as *Helvering v. Bliss* [35-1 USTC ¶9001], 293 U. S. 144 (1934) teaches us:

> ". . . The exemption of income devoted to charity and the reduction of the rate of tax on capital gains were liberalizations of the law in the taxpayer's favor, were begotten from motives of public policy, and are not to be narrowly construed. . . ."

I am not unmindful that *Rosehill Cemetery Company, as Trustee v. United States of America* [68-1 USTC ¶9309], 285 F. Supp. 21, D. C. (N. D. Ill. E. Div.) (2-14-68), and *Evergreen Cemetery Association of Seattle v. United States of America,* Civil No. 7206, lately adjudicated in the United States District Court for the Western District of Washington, Northern Division, appear to be contra to the above conclusion No. 6 as to Greenwood Trust's tax-exempt status.

I choose to be a follower of *Denver United States National Bank as Trustee v. United States of America,* [65-2 USTC ¶9556] United States District Court for the District of Colorado in civil action No. 8689 (6-4-65), as it seems to me that the factual situation in *Denver* is more akin to our situation here than either *Rosehill* or *Evergreen.*

Rosehill acknowledges in its election not to be a follower of *Denver* that *Denver* is distinguishable from its case in several *important respects* (emphasis supplied), saying:

> ". . . First, the trusts there were operated independently of the (cemetery operation company)—a bank, rather than the (cemetery operation company), was the trustee; second, the (cemetery operation company) appears to have had no role in the investment of funds, etc.; and again, the court there found that the trust income was used 'in its entirety' for the care and maintenance of the cemeteries . . ."

The parallel of those facts in *Denver* and the foregoing Findings of Fact herein are obvious.

Another glaring distinction of this case from *Rosehill* is the performance by the fund of *Rosehill's* legal obligation and duty of perpetual care. The recital of the facts in *Rosehill* states inter alia:

> ". . . In connection with the sale of burial lots and mausoleum compartments, *it* (the operating cemetery

company) *offers* for sale to the lot and compartment *owners its services* in caring for and maintaining the cemetery and the mausoleum." (Emphasis supplied.)

Also, in *Rosehill*, the operating cemetery company used the income supplied by the fund "to pay certain direct expenses, an allocated portion of general maintenance expense, as well as for depreciation." These allocations are, of course, a direct benefit to the operating cemetery company and its stockholders. I am satisfied that the alter ego relationship that existed between the operating cemetery company and the fund in *Rosehill* is good thesis for its conclusion, but that premise is wholly lacking here.

In our instant case, the income and corpus of the Greenwood Trust are irrevocably committed to providing perpetual care of the cemetery as the trustees or trustee shall from time to time elect and determine. The Greenwood Trust should not lose its charitable and public use status merely because it elected to hire and paid compensation to the Greenwood Corporation for the work done and materials supplied rather than any other privately-owned and operated for profit gardener or landscape business. The fact that the Greenwood Corporation carried on a general improvement policy of permanent maintenance and care on its own as a profit-making venture does not, in my opinion, taint the Greenwood Trust income utilized for extra and additional maintenance and perpetual care with profit making. While it would be naive to say that the Greenwood Corporation is not incidentally benefitted by the existence of the Greenwood Trust for permanent care in its sale of burial lots, this is in no means an inurement to its benefit of the net earnings of the Greenwod Corporation. It is to be noted that the inurement-of-earnings test

applies only to the third ground for exemption in Section 501(c)(13) *supra.*[6] Nevertheless, a discussion is helpful in pinpointing the two separate and distinct activities of the Greenwood Trust on the one hand and the Greenwood Corporation on the other.

> ". . . The payment of salaries or commissions to individuals does not constitute inurement of benefits so long as the payments are reasonable and for value received." *Home Oil Mill v. Willingham* [46-2 USTC ¶9368], 68 F. Supp. 525 (N. D. Ala., 145); *Mabee Petroleum Corp. v. United States* [53-1 USTC ¶9334], 203 F.2d 872 (5th Cir. 1953).
>
> ". . . The beneficiaries of the trust were the lot purchasers . . . the income from the permanent improvement fund had to be used as the statute (and Trust Agreement) commanded: 'For the permanent improvement, upkeep and beautification of its cemetery . . .' This would not bring gain or income to (Greenwood Corporation)." *Memphis Memorial Park, Inc. v. Commissioner* [CCH Dec. 23,688(M)], 18 T. C. M. 637 (1959).
>
> ". . . The profits of (Greenwood Corporation) are taxable because they inure to the benefit of its stockholders. The net earnings realized by (Greenwood Trust) are not taxable because they do not inure to the benefit of any private shareholder or individual." *Forest Lawn Memorial Park Association, supra.*

Of interest is *Estate of Edward T. Bedford* [CCH Dec. 10,714], 39 B. T. A. 1039 (1939) wherein the testator directed his trustee to pay $10,000 per year to his daughter to maintain public gardens on his property devised to her. In urging that this bequest should not be allowed the status of an income tax deduction for charitable contribution or purpose, the Commission urged that the daughter would benefit from the maintenance of the gardens since

6. This item becomes of importance in the later discussion of *Revenue Ruling* 58-190.

she lived on and owned the property and also that the market or resale value of the property was enhanced. The Court held that such an incidental benefit to the daughter did not vitiate the general public good nor deprive the estate of the charitable deduction.

Greenwood Corporation's agreement with Greenwood Trust is to timely remit all contributions and deposits made by the purchasers to the Endowment Fund and with that its legal obligations to the fund and its purchasers are fully satisfied, so it must necessarily follow that the purchasers of the lots and compartments by payment of the contributions or deposit to the fund become the true beneficiaries of this statutory trust agreement between Greenwood Trust and the purchasers. I can put it no better than to recall these words from *Commissioner v. Cedar Park Cemetery* [50-2 USTC ¶9376], 183 F.2d 553 (7 Cor.) (1950):

> "The Commissioner lays considerable stress on the argument that the income from the trust fund could be used to benefit the cemetery as a whole, rather than for the care of the various lots. We do not think that fact is significant. The owners of cemetery lots are necessarily concerned with more than the upkeep of their particular lot. They want assurance that after all the lots have been sold and at a time when the stockholders of the association will no longer receive any profits from the sale of lots, the roads, trees, shrubbery and grass and all parts of the cemetery will be maintained in a fitting and proper manner."

As I read *Evergreen Cemetery, supra*, it recognizes the same alter ego or adjunct relationship between the operating company and its fund as found in *Rosehill, supra*. Indeed, the Court's exhibits, contracts of sales between Evergreen Cemetery and purchasers of lots, dated December 27, 1939, and December 23, 1942, provide:

> "... (Evergreen) agrees that said lot or lots shall receive perpetual care in accordance with the rules and regulations of said (Evergreen Cemetery), without additional cost to ... (purchasers) ..."

The Government urges this Court to adopt the strict constructionist, alter ego, adjunct or subsidiary character of Greenwood Trust to Greenwood Corporation as found in *Revenue Ruling* 64-127 (1964) 2 *Cum. Bull.* 153 and *Produce Exchange Stock Clearing Association v. Helvering* [1934 CCH ¶9323], 71 F.2d 142, 2d Cir. (1934). I decline. Greenwood Trust is not "... merely adjunct to the business of ..." Greenwood Corporation, nor "... a subsidiary corporation to furnish such facilities ..." as delineated in *Produce Exchange, supra. Revenue Rules* 64-127 recites that, *unlike* Greenwood Corporation, the operating cemetery company here, the profit-making corporation in the example, as a part of its sales contract "... agrees ..." to place 10% of its sales price in a perpetual care fund "... and to provide *at its own expense* (emphasis supplied) for the care, maintenance, and upkeep of the cemetery until such time as the income from the perpetual care fund becomes sufficient to provide such care, ..." The ruling concludes, untenably in my opinion, that the services of the fund to the profit-making company "... constitute substantial assistance in its business by affecting salability and selling price of lots ..." and more importantly, in my opinion, which factor is totally absent here, relieves "... the company itself of a legal or contractual obligation ..." thereby inuring to its benefit.

Greenwood Trust has support for its tax exemption status in the Treasurer's *Rev. Rul.* 58-190, C. B. 1958-1, 15, citing the whole of Sec. 501(c)(13) *supra*, and stating,

> "... Although the instant organization (Greenwood Trust) does not own and develop land dedicated to the burial of the dead or perform certain other services usual to a non-profit cemetery company, it performs a service essential to the maintenance of a cemetery and is considered to be organized and operated for burial purposes within the contemplation of Sec. 501(c)(13) of the Code."

and found that the fund as such performed such services as placed it within the meaning and Congressional contemplation of a "cemetery compan(y)" delineated in Sec. 501(c)(13) *supra*. The ruling then grants the exempt status to the fund as such "cemetery compan(y)" under the third grounds.[7] *Rosehill*, a strict constructionist, found on a factual basis otherwise. *Denver* found a premise for granting an exemption status to its fund as a "cemetery compan(y)" on the second grounds (see its Conclusion of Law No. 9), as I do here.[8]

Alternate Contentions of Greenwood Trust for Exempt Status

Inasmuch as an appeal from the judgment contemplated in this opinion is most likely, it is advisable for this Court to deal with Trust Bank's alternative contentions for relief.

The Government asserts a variance between the Trust

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7. "... Accordingly, it is held that the instant organization whose funds are irrevocably dedicated to the perpetual care of a non-profit cemetery, as a whole, *none of the net earnings of which inures to the benefit of any private shareholder or individual*, may qualify for exemption..."

8. To be sure, *Rev. Ruling* 58-190, *supra*, was dealing with a non-profit operating cemetery company while in our case we are dealing with a profit-making operating cemetery company. Logically, this is no distinguishing factor. The important aspect of the *Rev. Ruling* is that it first dealt with the fund as a separate and distinct entity from and not as an adjunct to the non-profit operating cemetery company, and secondly, that "none of the net earnings of which inure(d) to the benefit of any private shareholder or individual."

Bank's pretrial contentions and the Greenwood Trust's claim for a refund of the 1963 and 1964 taxes (Finding of Fact No. 13). It appears that the claims for refund, after asserting the factual material, alleged that Greenwood Trust was entitled to a refund of the taxes paid on the grounds it was an exempt cemetery company under Sec. 501(c)(13), *supra*, and did not allege it was an exempt organization under Sec. 501(c)(13), *supra*, or entitled to charitable deductions under Sec. 642 of the Internal Revenue Code of 1954.

It appears that the pretrial order factual contentions of Trust Bank are without incidental, let alone material, change from the claims for refund alleged factual matters under which Greenwood Trust claimed an exemption. All that can be said for the claimed variance is that the claims for refund did not cite all of the Internal Revenue Code sections under which the alleged facts would tend to establish an exempt status, but this is enough.

I am of the opinion this Court may not consider whether Greenwood Trust has tax exempt status under either one of Secs. 501(c)(3) and 642, *supra*.

Nemours Corp. v. United States [51-1 USTC ¶9271], 188 F.2d 745 (3 Cir.), told us about twenty years ago:

> "A long-standing statutory provision with regard to tax refunds is that suits may be brought only after a claim for refund has been filed with the Commissioner in accordance with the law and Treasury Regulations. The Regulations governing refunds under the statute in question here provide that 'The claim must set forth in detail . . . each ground upon which a refund is claimed, and facts sufficient to apprise the Commissioner of the exact basis thereof.' It is to be noted that both the grounds for recovery and the facts supporting them must be shown. The taxpayer stated as its

ground for refund Section 26(f) and made its computation accordingly. That does not, under the decisions, give him a right to claim under some other section." (Citing *Real Estate-Land Title & Trust Co. v. United States* [40-1 USTC ¶9184], 1940, 309 U. S. 13.)

"This is hard law, no doubt. Perhaps it is necessarily strict law in view of the scope of the operations of a fiscal system as large as that of the United States.

EVERGREEN CEMETERY ASSOCIATION OF SEATTLE, a Corporation,
Plaintiff,
v.
UNITED STATES OF AMERICA,
Defendant.

United States District Court, Western District of Washington, Northern Division, Civil No. 7206, May 15, 1969.—(302 F. Supp. 720.)

[Code Sec. 501]

Exempt organization: Cemetary company v. trust: Perpetual care fund.—A nonprofit trust, the income of which was irrevocably set aside for the perpetual care and maintenance of cemetery plots, was not exempt from income tax as a cemetery company or a corporation chartered as a cemetery company where the income has been furnished to a for-profit cemetery corporation. Further, care and maintenance provided by the taxpayer trust to the cemetery corporation so long as the cemetery was operated for profit, did not constitute a charitable purpose. Accordingly, taxpayer was taxable on capital gains realized in taxable years 1963 and 1964. Back reference: ¶3053.07.

Joseph Holmes, Jr., 1411 Fourth Ave. Bldg., Seattle, Wash., for plaintiff. W. Forbes Ramsey, Johnnie M. Walters, Assistant Attorney General, Washington, D.C. 20530, Samuel Pitkin, United States Attorney, Seattle, Wash., for defendant.

Findings of Fact and Conclusions of Law

LINDBERG, District Judge: This cause having come on

regularly for trial on February 10, 1969 before the court without a jury, and the court having heard the evidence and the argument of counsel, and having considered the findings of fact and conclusions of law prepared by each of the parties and being well advised, makes the following

Findings of Fact

1. This is a civil action in which plaintiff, Evergreen Cemetery Association of Seattle (hereinafter referred to as the "Association") seeks to recover federal income taxes for the years 1963 and 1964 in the amounts of $45,242.97 and $4,972.00, respectively, which were assessed and collected by the defendant, together with statutory interest thereon (paragraph 3 of pretrial order —jurisdiction).

2. The Association was organized as a Washington non-profit and non-stock corporation on June 22, 1946, for the purposes of operating a cemetery (although in fact it has never operated a cemetery) and in particular of furnishing perpetual care and maintenance to the grave sites located in Evergreen Memorial Park, which is a cemetery property located in King County, Washington. Its principal place of business is at 11111 Aurora Avenue North, Seattle, Washington (Exhibit 1; paragraph 2 of pretrial order—jurisdiction).

3. The Association filed United States corporate income tax returns (Treasury Form 1120) for each of the years 1963 and 1964. Timely claims for refund of the federal income taxes and accrued interest were also filed by the Association which were disallowed in full by the District Director of Internal Revenue, Tacoma, Washington, on

June 1, 1967, (paragraphs 4, 5 and 6 of pretrial order—jurisdiction).

4. Evergreen Cemetery Company of Seattle is a profit-making Washington corporation engaged solely in the cemetery business. Evergreen Cemetery Company of Seattle, hereinafter sometimes called the "Cemetery Company," operates three cemeteries: Evergreen Memorial Park, Washelli Cemetery and Abbey View Memorial Park. Each of these cemeteries has been placed under endowment care (paragraph 1 of pretrial order).

5. The Cemetery Company is in the business of selling cemetery lots and burial crypts and niches, preparing graves for burial, selling monuments and operating a flower shop (paragraph 3 of pretrial order; testimony of J. Hackett). The Cemetery Company has filed federal income tax returns for each year of its existence (paragraph 4 of pretrial order).

6. On or about August 15, 1940, the Cemetery Company established a perpetual care fund known as the "Perpetual Care Fund of the Evergreen Cemetery Company of Seattle." The Perpetual Care Fund of the Evergreen Cemetery Company of Seattle was established by a trust agreement dated August 1, 1940, between the Cemetery Company as grantor and Day Karr, S. W. Barker and C. S. Harley as trustees (paragraph 2 of pretrial order). This trust agreement recited that the trust was formed because the Cemetery Company desired to make provision for the perpetual care and maintenance of Evergreen Memorial Park (Exhibit 5).

7. At the time the Perpetual Care Fund of the Evergreen Cemetery Company of Seattle was established on August

15, 1940, the Cemetery Company delivered to the trustees certain assets which it had previously held in trust for endowment care of burial lots which it had sold in Evergreen Memorial Park. In addition, the trustees were specifically authorized to accept future additions of property to be held solely for the purposes of the fund (paragraph 5 of the pretrial order).

8. On or about April 24, 1943, this trust agreement was replaced by a second trust agreement entered into by the same parties. This second trust agreement withdrew some of the powers which the Cemetery Company had over the trust fund (Exhibit 6).

9. Under the terms of contracts for the sale of cemetery lots and burial crypts and niches in Evergreen Memorial Park, the Cemetery Company has agreed with the purchasers that the final 10% of the sales proceeds will be delivered to the trust to be used for endowment care and the Cemetery Company has delivered such portions of the sales price of each cemetery lot and burial crypt and niche sold in Evergreen Memorial Park to the care fund (paragraph 6 of pretrial order; testimony of J. Hackett and W. Scott and Exhibits 8 and 44-51).

10. The sales contracts used during the 25 years from 1939 to 1964 provide that the purchasers will receive perpetual care in accordance with the rules and regulations of the Cemetery Company which limit care and maintenance to the income of the endowment care fund. The perpetual care was emphasized by the Cemetery Company in attempting to sell lots and was essential to the successful sale of the cemetery lots by the Cemetery Company (exhibits 8, 44-51; testimony of W. Scott).

11. On or about June 20, 1946, the trustees of the Perpetual Care Fund of the Evergreen Cemetery Company of Seattle, caused the Association to be organized for the purposes of succeeding to the assets, liabilities, rights and duties of the Perpetual Care Fund of the Evergreen Cemetery Company of Seattle (paragraph 7 of pretrial order; exhibit 1, article IV).

12. On December 31, 1946, the trustees of the Perpetual Care Fund of the Evergreen Cemetery Company of Seattle entered into an agreement with Evergreen Cemetery Association of Seattle and the Cemetery Company (paragraph 8 of pretrial order; exhibit 9).

13. Pursuant to the terms of the December 31, 1946, agreement the trustees transferred and delivered to the Association all of the assets of the trust and the Association accepted such assets and agreed to administer them in accordance with the terms of the April 24, 1943, trust agreement (paragraph 8 of pretrial order).

14. Each living owner of a cemetery lot and burial niche or crypt in Evergreen Park is a member of the Association and is entitled to cast one vote in connection with the affairs of the Association (paragraph 9 of pretrial order; exhibit 1).

15. Regular and special meetings of the members of the Association have been held each year since 1946. Notices of each of these meetings have been published in a newspaper of general circulation published and circulated in King County, Washington, not less than 10 days nor more than 20 days prior to the date of each meeting (paragraph 10 of pretrial order).

16. C. Frederick Harley, C. S. Harley, Payne Karr, Win-

ston Scott, Philip A. Strack and Nelson Wahlstrom were the trustees of the Association during the years 1963 and 1964. Each of the trustees except Philip A. Strack was a stockholder of the Cemetery Company and on the Board of Directors of the Cemetery Company. C. Frederick Harley, C. S. Harley and Winston Scott were employees of the Cemetery Company. Payne Karr was a practicing attorney who handled the legal affairs of the Cemetery Company and the Association. Philip A. Strack was president of Peoples National Bank of Washington and Nelson Wahlstrom was comptroller of the University of Washington (paragraph 11 of pretrial order; exhibit A-1; testimony of W. Scott).

17. Each of the trustees was paid a nominal fee during the years 1955 to 1964, solely for services rendered to the Association. No other item of income, as that term is defined for federal income tax purposes, was paid to any officer, trustee or member of the Association during the years 1955 to and including 1964 (paragraph 12 of pretrial order; exhibit 10).

18. Under the terms of the contracts for the sale of cemetery lots and burial crypts and niches in Evergreen Memorial Park the Cemetery Company has agreed with the purchaser that the final ten percent of the sales proceeds will be delivered to the trust to be used for endowment care and this agreement has been consistently followed by the Cemetery Company (paragraph 6 of the pretrial order; testimony of J. Hackett and W. Scott; exhibits 8, and 44 through 51).

19. At all times from 1940 to 1964, the principal of the trust fund maintained by the Association and all

amounts of income earned prior to delivery of the income earned prior to delivery of the income to the Cemetery Company have been maintained in separate accounts with independent third parties not related in any manner to the Cemetery Company or the Association. During 1963 the custodian of the investment funds of the Assoication was the Peoples National Bank of Washington, Main Office, Seattle, Washington, and for 1964 it was Dominick and Dominick, Norton Building, Seattle, Washington. The following are the principal balances of the trust fund as the end of each of the years 1955 to 1964.

Year	*Amount*
1955	$350,313.54
1956	379,662.46
1957	404,714.50
1958	439,915.73
1959	470,655.81
1960	511,777.25
1961	556,668.70
1962	607,938.45
1963	815,722.84
1964	854,107.92

(paragraph 14 of pretrial order and exhibit 12).

20. Each year since the formal organization of the Perpetual Care Fund of the Evergreen Cemetery Company of Seattle trust on August 15, 1940, and the organization of the Association on December 31, 1946, to and including 1964, all of the income from the trust has been paid to the Cemetery Company and has been used solely and exclusively for the care and maintenance of Evergreen Memorial Park. The following is a schedule of the amounts delivered by the Association to the Cemetery Company in each of these years:

Year	Amount
1940	$ 1,456.29
1941	3,168.43
1942	2,989.77
1943	3,416.35
1944	3,421.47
1945	3,557.66
1946	3,584.71
1947	4,096.33
1948	4,356.50
1949	4,718.16
1950	8,891.98
1951	9,645.57
1952	11,476.88
1953	15,817.36
1954	19,209.67
1955	20,957.94
1956	22,094.78
1957	23,405.16
1958	21,173.72
1959	22,749.16
1960	24,116.24
1961	25,934.79
1962	29,736.80
1963	38,681.35
1964	45,725.48

(paragraph 13 of pretrial order; exhibit 11; testimony of J. Hackett, W. Scott and O. Parrott; exhibits 40 and 41).

21. During 1963 and 1964 the Association had net capital gains of $180,971.89 and $61,228.00, respectively, from the sale of securities of the endowment care fund (exhibits 3 and 4). These securities were sold because while they had experienced capital appreciation they were not good income producing securities. Funds derived from the sales of securities were reinvested in higher income producing securities with capital gains potential (testimony of W. Scott). The trust agreements of 1940 and 1943 required all capital gains to be added to principal (exhibit 5, paragraph 13(5); exhibit 6, paragraph 12(5)).

22. The 1943 trust agreement provides that if the Cemetery Company failed to properly look after the permanent care of Evergreen Memorial Park then the trustees are authorized to assume direct control over and responsibility for care and maintenance (exhibit 6, paragraph 27).

23. During the years in question, the books of the Cemetery Company showed the sale of lots and the segregation of the ten percent of the sales price to be paid for permanent care; collection of the ten percent by the Cemetery Company and its payments to the Association. The Association would submit the funds to the custodian. At the end of each month the custodian would send a check to the Cemetery Company for the amount of income from the funds for that month. This check would be deposited in the General Bank Account of the Cemetery Company. This transaction would be reflected on the books of the Association as the receipt of income and an immediate expenditure in the same amount for care and maintenance. Actual maintenance expenses as they accrued each month were not billed or checked but yearly maintenance costs have been appreciably larger than yearly income. The books of the Association were kept by the bookkeeper of the Cemetery Company in an office provided by the Cemetery Company (testimony of J. Hackett).

24. At the end of each year the Cemetery Company furnished a letter to the Association and to the Washelli Cemetery Association, which is a corporation identical to the plaintiff Association that handles endowment care for Washelli Cemetery. This letter sets forth the cost of maintaining the two cemeteries, the combined income from the two endowment care associations, the amount

expended by the cemetery on maintenance and care and an approximation of the deficiency in maintenance income provided by the two endowment care associations (exhibits 37 and 38). In every year up to the present time the cost of maintaining the cemetery has so far exceeded the income from the two endowment care associations, that it has been unnecessary to segregate the expenses of the two cemeteries or to segregate the income from the two funds.

25. The income and principal endowment care fund of the Association are exclusively and irrevocably committed to providing care and maintenance of Evergreen Memorial Park (exhibits 1, 2, 5, 6 and 9).

Conclusions of Law

1. Evergreen Cemetery Association is organized under the laws of the State of Washington as a non-profit corporation and chartered solely for burial purposes as a cemetery corporation. It is not permitted by its charter to engage in any business not necessarily incident to burial purposes.

2. The Association was organized for the purpose of administering the cemetery endowment care trust established to provide perpetual care and maintenance of the Evergreen Memorial Park cemetery which has been undertaken by the Association.

3. Administration of the income and principal corpus of the endowment care trust fund by the Association is specifically regulated by the Cemetery Code of the State of Washington which limits the use of income from the fund to care and maintenance of the cemetery and requires that the principal corpus be exclusively and per-

petually maintained to provide income for care and maintenance of the cemetery.

4. The Association is owned and operated exclusively for the benefit of its members, the lot owners in Evergreen Cemetery Memorial Park.

5. The owners of burial lots, crypts and niches in Evergreen Memorial Park and the general public are the beneficiaries of the endowment care trust administered by the Association.

6. The income and principal of the endowment care trust fund administered by the Association are exclusively and irrevocably committed to providing care and maintenance of the Evergreen Memorial Park cemetery and can be used for no other purpose.

7. Payment of the income of the endowment care trust fund to Evergreen Cemetery Company of Seattle (the Cemetery Company) is only for services rendered and to be rendered to the Association and lot owner members of the Association in caring for and in maintaining the Evergreen Memorial Park cemetery.

8. During 1963 and 1964 the income of the endowment care trust fund was used exclusively for care and maintenance of the Evergreen Memorial Park cemetery.

9. Neither the Association nor the endowment care trust fund administered by the Association are operated for profit.

10. During 1963 and 1964 the Association realized capital gains from the sale of securities which were held as part of the principal corpus of the endowment care trust

fund. Capital gains cannot be distributed as income for perpetual care and maintenance.

11. The capital gains realized by the Association in 1963 and 1964 were added to the principal corpus of the endowment care trust fund and were permanently set aside to maintain Evergreen Memorial Park Cemetery.

12. The taxes which the Association is seeking to have refunded are based solely on the capital gains reported by the Association for 1963 and 1964.

13. Evergreen Memorial Park Cemetery is a cemetery operated for profit.

14. Care and maintenance as provided by plaintiff to Evergreen Memorial Park Cemetery so long as the Cemetery is operated for profit, does not constitute charitable purpose, as that term is defined or used in sections 501(c)(3) and 642(c) of the Internal Revenue Code of 1954 (26 U.S.C.A. §§501(c)(3) and 642(c)).

15. The endowment care trust fund which the Association administers is not a "cemetery company" or a "corporation chartered * * * as a cemetery company" and is not entitled to a tax exemption under section 501(c)(13) of the Internal Revenue Code of 1954 (26 U.S.C.A. §501(c)(13)).

16. Evergreen Cemetery Association is not entitled to a refund from the defendant of all taxes paid defendant for 1963 and 1964.

17. Judgment should be entered for the defendant and the plaintiff's cause and action dismissed with prejudice.